IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION
GENERAL CHANCERY SECTION

CARIE HOOKER, Plaintiff, v. GARRY MCCARTHY, ET AL., Defendants.	No. 12 CH 5841 Honorable Franklin Valderrama Calendar 03

MEMORANDUM OPINION AND ORDER

This matter comes to be heard on Plaintiff, Carie Hooker's, Complaint for Administrative Review. For the reasons that follow, the decision of the Police Board of the City of Chicago is affirmed.

BACKGROUND

Plaintiff, Carie Hooker ("Hooker"), has been employed as a police officer for the Chicago Police Department since approximately March 17, 1997. (Tr. 15). In or around May 2008, Hooker went on medical leave after she suffered a neck injury and a dog bite to her right hand. (Tr. 153). On or about May 19, 2008, while on medical leave, Hooker went shopping at Chicago Ridge Mall. (Tr. 155). While shopping, Hooker entered Kohl's Department Store ("Kohl's") carrying a large Aeropostal shopping bag (the "shopping bag") that contained purchases from Aeropostal, Carson Prairie Scott, and the Children's Place. (Tr. 16-17, 155-56).

As Hooker browsed through Kohl's, she selected several shirts, which she removed from their hangers and placed on top of her shopping bag. (Tr. 18). Lauren Gilkerson ("Gilkerson"), Kohl's Loss Prevention Supervisor, witnessed Hooker's actions and began to monitor Hooker via video surveillance, as removing items from hangers is a behavior consistent with retail theft. (Tr. 17, 54-55). Hooker subsequently selected four (4) pairs of pants and took the selected items into the fitting room. (Tr. 17, 68). Hooker put several items in her shopping bag and returned the unwanted items to the rack located outside of the fitting room. (Tr. 18, 30) Upon exiting the fitting room, Hooker continued to shop, going to the shoe department. (Tr. 18). Gilkerson continued to monitor her, however, the shelves in the shoe department blocked video surveillance; therefore, Gilkerson went to the sales floor to monitor Hooker. (Tr. 57-58). While in the shoe department, Hooker picked out a pair of shoes and subsequently took them to the sales counter for purchase. Hooker did not, however, pay for the items that she previously placed in her shopping bag. (Tr. 164-65). Upon exiting Kohl's, members of the Kohl's Loss

Prevention Team approached Hooker, and escorted her to the Kohl's Prevention Office. (Tr. 21). After being taken to the office, Gilkerson processed Hooker and Hooker informed Gilkerson that she was a Chicago Police Officer. (Tr. 59). Subsequently, a Chicago Ridge Police Officer, James Davey ("Officer Davey"), arrived at Kohl's and arrested Hooker for retail theft.[1] (Tr. 24-25). After being arrested by Officer Davey, Hooker did not submit a written report to her unit commanding officer, informing him that she was under investigation, as required pursuant to General Order 93-03-5B, Section IV-A. (Tr. 44-45).

The misdemeanor criminal charge against Hooker, for retail theft, was subsequently dismissed in exchange for completion of 24 hours of community service, and Hooker expunged the arrest from her record. (Tr. 43-44).

On or about July 11, 2011, the Superintendent of the Chicago Police Department, Gary McCarthy (the "Superintendent"), filed a complaint against Hooker with the Chicago Police Board ("Board") for violation of several rules promulgated by the Board.

The Superintendent recommended that Hooker be discharged from the Chicago Police Department. The Board conducted a hearing and on January 19, 2012, issued its Final Opinion and Order. The Board agreed with the Superintendent's allegations and found that Hooker was guilty of violating all four (4) rules with which she was charged, namely:

> Rule 1: Violation of any rule or ordinance, in that on or about May 19, 2008, she committed retail theft at Kohl's department store, located at or near 9700 South Ridgeland Avenue, Chicago Ridge, Illinois, in violation of 720 ILCS 5/16A-3A, in that she knowingly took possession of or carried away one or more items of merchandise with the intention of retaining the merchandise or depriving the merchant permanently of the possession, use, or benefit of the merchandise without paying full retail value.
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> Rule 2: Any action or conduct which impedes the Department's efforts to achieve its policy and goals or brings discredit upon the Department, Count I, in that on or about May 19, 2008, she committed retail theft at Kohl's Department Store, located at or near 9700 South Ridgeland Avenue, Chicago Ridge, Illinois, and left Kohl's department store without paying for merchandise, thereby impeding the Department's efforts to achieve its policy and goals and/or bringing discredit upon the Department. Count II, she failed to submit immediately a written report to her unit commanding officer that she was under investigation by the Chicago Ridge Police Department on May 19, 2008, thereby impeding the Department's efforts to achieve its policy and goals and/or bringing discredit upon the Department.
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> Rule 6: Disobedience of an order or directive, whether written or oral, in that on or about May 19, 2008, she failed to submit immediately a written report to her

[1]Hooker was arrested for violation of 720 ILCS 5/16A-3, which was repealed by P.A. 96-1301, § 5, effective January 1, 2012.

unit commanding officer that she was under investigation by the Chicago Ridge Police Department on May 19, 2008, thereby violating General Order 93-03-05B, Section IV-A.

Rule 20: Failure to submit immediately a written report that any member, including self, is under investigation by any law enforcement agency other than the Chicago Police Department, in that she failed to submit immediately a written report to her unit commanding officer that she was under investigation by the Chicago Ridge Police Department on May 19, 2008.

(Board's Findings and Decision, pp. 2-5).

Consequently, the Board ordered that Hooker be discharged from her duties as a police officer with the Chicago Police Department. (Id. at 6). Hooker then filed the instant Petition for Administrative Review of the Board's decision.

ADMINISTRATIVE REVIEW STANDARD

On administrative review, the standard of review applied by the trial court depends on the issue presented on review. Express Valet Inc. v. City of Chicago, 373 Ill. App. 3d 838, 847 (1st Dist. 2007). There are three types of questions that courts may encounter on administrative review of an agency's decision: (1) questions of fact, (2) questions of law, and (3) mixed questions of fact and law. Cinkus v. Vill. of Stickney Mun. Officers Electoral Bd., 228 Ill. 2d 200, 210 (2008).

Where the scope of review of an administrative agency's decision is that of discharge, a two-step analysis is required. Krocka v. Police Bd. of the City of Chicago, 327 Ill. App. 3d 36, 46 (1st Dist. 2001). First, the court must determine whether the agency's findings are contrary to the manifest weight of the evidence. Id. A determination of whether an administrative decision is against the manifest weight of the evidence is a factual determination, and the administrative agency's findings and conclusions of fact are deemed to be prima facie true and correct. 735 ILCS 5/3-110 (West 2010); O'Boyle v. Pers. Bd. of Chicago, 119 Ill. App. 3d 648, 653 (1st. Dist. 1983). In examining an administrative agency's factual findings, a reviewing court does not weigh the evidence or substitute its judgment for that of the agency. Cinkus, 228 Ill. 2d at 210. Indeed, "a reviewing court may not re-evaluate the credibility of witnesses or resolve conflicting evidence." Alden Nursing Ctr.-Morrow, Inc. v. Lumpkin, 259 Ill. App. 3d 1027, 1033 (1st Dist. 1994). An administrative agency's factual findings are against the manifest weight of the evidence only if no trier of fact could have agreed with the agency or an opposite conclusion than that reached by the agency is clearly evident. Wade v. City of North Chicago Police Pension Bd., 226 Ill. 2d 485, 505 (2007). If the issue before the reviewing court is merely one of conflicting testimony and credibility of witnesses, the administrative board's decision should be sustained. O'Boyle, 119 Ill. App. 3d at 653. The plaintiff has the burden of proving the issues raised in the complaint. Iwanski v. Streamwood Police Pension Bd., 232 Ill. App. 3d 180, 184 (1st Dist. 1992).

The second step in a trial court's review of an administrative agency's decision of discharge is determining whether the findings of fact provide a sufficient basis for the agency's conclusion that cause for discharge does or does not exist. Krocka v. Police Bd. of the City of Chicago, 327 Ill. App. 3d 36, 46 (1st Dist. 2001). An agency's decision as to cause will not be reversed unless it is arbitrary, unreasonable, or unrelated to the requirements of service. Id.

DISCUSSION

Hooker contends that the Board's decision to discharge her was improper for two reasons. First, Hooker argues that the Board's decision was against the manifest weight of the evidence. Hooker maintains that the Superintendent failed to present any evidence to the Board that showed that she intentionally left Kohl's without paying for the items found in her shopping bag. To the contrary, asserts Hooker, there is ample evidence that she did not intend to leave the store without paying for the items, namely that the tags were still on the items; she purchased shoes from Kohl's; and she had receipts for all of her previously purchased items.

Hooker also asserts that the Board's finding that she failed to immediately submit a written report to her commanding unit officer was unreasonable and against the manifest weight of the evidence. Hooker maintains that the Board failed to take into consideration her proffered explanations as to why she failed to submit a written report, namely that Officer Davey advised her that he would notify her commanding unit officer; that she had to pick up her son from his babysitter; and that the next day she had a doctor's appointment.

In the alternative, Hooker maintains that the Board's decision to discharge her was excessive, arbitrary, and unrelated to the requirements of service. Hooker argues that she had never been disciplined during her career as a Chicago Police Officer, and that her reputation, which was attested to by five (5) other Chicago Police Officers, was exemplary. Hooker contends that even if she had intended to leave Kohl's without paying for the merchandise, the penalty of discharge is nevertheless excessive.

The Superintendent responds that the Board's decision was not against the manifest weight of the evidence, as the evidence showed that Hooker knowingly carried over $100.00 worth of Kohl's merchandise out of Kohl's with no intent to return the items and that she failed to notify her unit commanding officer after she was released from custody. Contrary to Hooker's contention that there was no evidence of "intent," the Superintendent asserts that the Board found the testimony of the Superintendent's witnesses regarding Hooker's intent, to be credible and Hooker's testimony regarding the same less credible, noting that her testimony continuously changed. The Superintendent argues that the Board also considered the testimony of Officer Davey who stated that while the tags were not taken off of the merchandise recovered from Hooker, or otherwise tampered with, that was not a conclusive indication that there was no intent to steal the merchandise.

As to Hooker's explanation for her failure to notify her unit commanding officer, the Superintendent points out that Officer Davey testified that he never advised Hooker that he would contact her commanding unit officer on her behalf. Notwithstanding her explanations, the Superintendent argues that whether Hooker inadvertently or deliberately failed to make the

report is of no consequence. Rather Hooker was required to immediately submit a written report and she failed to do so.

Finally, the Superintendent argues that the sanction of discharge is not excessive because Hooker's conduct was related to her duties to the public and said conduct had the effect of undermining public confidence in police officers, thereby diminishing the effectiveness of the Department.

ANALYSIS

The first question presented to this Court is one of fact; namely, whether the Board's findings and conclusions were against the manifest weight of the evidence. In other words, the Court must determine whether the Board's findings were erroneous and the opposite conclusion is clearly evident. A reviewing court has a duty to examine the evidence in an impartial manner and set aside an agency order that is unsupported in fact. Boom Town Saloon, Inc. v. City of Chicago, 384 Ill. App. 3d 27, 32 (1st Dist. 2008). When there is evidence to support the agency's findings, its decision will be affirmed. Commonwealth Edison Co. v. Prop. Tax Appeal Bd., 102 Ill. 2d 443, 467 (1984). It is within this framework that the Court analyzes the evidence.

Hooker was arrested for retail theft. A person commits the offense of retail theft when he or she knowingly:

> [t]akes possession of, carries away, transfers or causes to be carried away or transferred, any merchandise displayed, held, stored or offered for sale in a retail mercantile establishment with the intention of retaining such merchandise or with the intention of depriving the merchant permanently of the possession, use or benefit of such merchandise without paying the full retail value of such merchandise; * * *

720 ILCS 5/16A-3 (West 2010) (repealed January 2012).

The evidence before the Board revealed that on May 19, 2008, Hooker went to Kohl's carrying a large Aeropostal shopping bag. (Tr. 16-17). Hooker selected several shirts and removed the shirts from their hangers. (Tr. 18; 54-55). At this point, Gilkerson began to monitor Hooker via video surveillance. (Tr. 55). According to Gilkerson, removing items from hangers is behavior consistent with retail theft. (Id.). Hooker then selected four pairs of pants and then proceeded to the fitting room. (Id.). Hooker later exited the fitting room, after placing all of the items, except three (3) pairs of pants, in the shopping bag. (Tr. 17-18). Hooker then went to the shoe department, where she tried on several pairs of shoes. (Tr. 18; 57; 162). Gilkerson continued to monitor Hooker; however, the shelves in the shoe department blocked the video surveillance. (Tr. 58). Gilkerson then left the loss prevention office and continued to monitor Hooker from the sales floor. (Id.). Hooker selected a pair of shoes and proceeded to the checkout counter. (Tr.18). Hooker, at this point, still had the items in her shopping bag. (Tr. 76-77; 164). Hooker paid for the shoes and proceeded to leave the store, with the unpaid items

still in her shopping bag. (Tr. 21; 58). Kohl's Loss Prevention Team stopped Hooker outside of Kohl's and took Hooker to the loss prevention office. (Tr. 58-59).

Officer Davey later arrived at Kohl's. (Tr. 125-26). Officer Davey asked Hooker about the items in her shopping bag that she did not pay for. (Tr. 128). Hooker explained that she inadvertently placed the items in her shopping bag and forgot that they were there. (Id.). Officer Davey arrested Hooker for retail theft. (Tr. 24-25).

The gravamen of Hooker's argument is that the Superintendent provided no evidence of intent. Specifically, Hooker contends that the Superintendent did not present any evidence that the she intentionally left Kohl's without paying for the items. On the contrary, Hooker argues, the evidence showed that she did not intend to leave without paying for the items, as the tags were still on the merchandise; she purchased shoes from Kohl's; and she had receipts from other previous purchases. Hooker maintains that it was difficult to carry all of the items due to a previously sustained injury and, therefore, was only able to use one hand while shopping. This Court respectfully disagrees. While there was no direct evidence presented of Hooker's intent to depart Kohl's without purchasing the items, there was sufficient circumstantial evidence. Circumstantial evidence is sufficient alone to prove the element of intent beyond a reasonable doubt. People v. Thompson, 48 Ill. 2d 41, 47 (1971). Indeed, circumstantial evidence is most often the only way to prove a defendant's intent to commit a theft or other crime. People v. Rudd, 2012 IL App (5th) 100528, ¶ 14. Moreover, Gilkerson testified that she continuously observed Hooker's actions while shopping at Kohl's and witnessed Kohl's merchandise visible inside of Hooker's shopping bag. Gilkerson further testified that as Hooker continued to shop the items became less visible and the items were ultimately concealed under other items in the bag. Admittedly, Hooker's account of the events is to the contrary, as she testified that she did not intend to deprive Kohl's of its merchandise. However, the Board found Hooker's testimony to be inconsistent and, therefore, not credible. Additionally, Officer Davey testified that while tags are sometimes taken off the merchandise, a fairly large percentage of shoplifters leave the tags on. (Tr. 134). It is not within the province of the Court to assess or re-evaluate the credibility of the witnesses or to resolve conflicting evidence. Trettenero v. Police Pension Fund of the City of Aurora, 333 Ill. App. 3d 792, 802 (2d Dist. 2002). In light of the testimony of Hooker, Gilkerson, and Officer Davey, as well as the video surveillance recording, this Court cannot say that no trier of fact could have agreed with the Board's determination that Hooker violated Rule 1 and Count I of Rule 2, in that she committed retail theft. Nor can this Court say that an opposite conclusion that that reached by the Board is clearly evident

The Court reaches the same conclusion as to the Board's finding regarding Count II of Rule 2, as well as Rule 6 and Rule 20. Hooker admitted that once she was under investigation by the Chicago Ridge Police Department, she was required to immediately submit a written report to her unit commanding officer. (Tr. 45). Hooker also admitted that she never submitted the written report. (Tr. 45-46). While Hooker offered various explanations for this omission, the fact remained that she never submitted the report. As such, the Court finds that the Board's findings that Hooker violated Rules 1, 2, 6 and 20 were not against the manifest weight of the evidence. This, however, does not end the Court's analysis.

The second issue before the Court is whether the Board's decision to discharge Hooker, rather than suspend her, was excessive, arbitrary, and unrelated to the requirements of service. Accordingly, this Court must determine whether the findings of fact provide a sufficient basis for the Board's conclusion that cause for discharge exists. Krocka, 327 Ill. App. 3d at 46. According to the Illinois Municipal Code, a police officer may not be discharged without cause. See 65 ILCS 5/10-18 (West 2008). While the Code does not define the term "cause," it has been judicially defined as "some substantial shortcoming which renders the employee's continuance in office in some way detrimental to the discipline and efficiency of the service and which the law and sound public opinion recognize as good cause for his no longer holding the position." Id., citing Kappel v. Police Bd., 220 Ill. App. 3d 580, 589 (1st Dist. 1991). The Board has "considerable latitude" and "considerable discretion" in determining what constitutes cause for discharge. Krocka, 327 Ill. App. 3d at 46. A finding of cause for discharging an employee should be overturned "only if it is arbitrary and unreasonable and unrelated to the requirements of the service." Walsh v. Bd. of Police and Fire Comm'rs, 96 Ill. 2d 101, 105 (1983). The Board's decision will stand even if a court considers another sanction more appropriate. Duncan v. City of Highland Bd. of Police & Fire Comm'rs, 338 Ill. App. 3d 731, 736 (5th Dist. 2003). This is because the Board is in the best position to determine the effect of the officer's conduct on the proper operation of the department. Id.

Hooker contends that the Board's decision to discharge her was arbitrary, unreasonable and unrelated to the requirements of service. Hooker cites several cases as examples where the sanction of discharge was deemed "too harsh." See e.g. Massingale v. Police Bd., 140 Ill. App. 3d 378 (1st Dist. 1986) (the court found the penalty of discharge unduly harsh for a police officer with seven years of service who recklessly drove her vehicle while intoxicated and gave false information during an official investigation); Kirsch v. Rochord, 55 Ill. App. 3d 1042 (1st Dist. 1977) (the court held that the penalty of discharge was unwarranted for a police officer who was intoxicated and involved in a public disturbance and refused an order from a superior to submit to an alcohol influence test); Styck v. Iriquois County Sheriff's Merit Comm'n, 253 Ill. App. 3d 430 (1994) (the court overturned the penalty of discharge imposed on a police officer who used loud vulgar and abusive language towards his ex-wife during a public quarrel); Washington v. Civil Service Commission of the City of Evanston, 98 Ill. App. 3d 49 (1981)(the court found that a twenty-nine (29) day suspension imposed on an officer who solicited sex from a shoplifting arrestee in exchange for leniency unduly harsh and unwarranted. Instead, the court found that a five (5) day suspension to be sufficient); and Keen v. Police Bd. of the City of Chicago, 73 Ill. App. 3d 65 (1979) (the court upheld a police board's decision to suspend, rather than discharge, a police officer who made sexual advances towards a citizen while on duty and transporting open alcohol in his squad car).

The Court, however, finds that the cases cited by Hooker inapplicable. The fact that different individuals have been disciplined differently is not a basis for concluding that an agency's disciplinary decisions unreasonable. Siwek v. Police Bd., 374 Ill. App. 3d 735, 738 (1st Dist. 2007), citing Launius v. Board of Fire & Police Comm'rs, 151 Ill. 2d 419, 441-42 (1992). Rather, an administrative tribunal's finding of "cause" for discharge may be considered arbitrary and unreasonable when it is compared to the discipline imposed in a completely related case. Launius, 151 Ill. 2d at 441-42. Hooker does not argue that any of aforementioned cases are an identical or completely related case. Moreover, Illinois courts have routinely found that

where an officer is found guilty of theft or even conduct strongly indicative of the commission of a theft, discharge is the appropriate sanction. See e.g. Jones v. Civil Service Comm'n of Alton, 80 Ill. App. 3d 74 (5th Dist. 1979)(court affirmed sanction of discharge of an off-duty officer found guilty of retail theft); Hruby v. Bd. of Fire & Police Comm'nrs, 22 Ill. App. 3d 445 (1st Dist. 1974) (court upheld sanction of discharge of a police officer for unbecoming conduct strongly indicative of the commission of a theft, despite the police officer having been acquitted of such charges in a prior criminal prosecution of theft). In the present matter, Hooker was charged with retail theft. Illinois courts have found that a police officer who does not abide by the laws that he or she has a duty to enforce will impair the discipline and efficiency of the police force. Kappel v. Police Bd. of the City of Chicago, 220 Ill. App. 3d 580, 590 (1st Dist. 1991). Additionally, courts have found that a police department has a legitimate interest in ensuring its officers maintain integrity, abide by all laws and avoid any conduct that would tend to reflect negatively on the office. See Vill. of Oak Lawn v. Human Rights Com., 133 Ill. App. 3d 221, 224 (1st Dist. 1985). Therefore, the Court finds that the Board's decision to discharge was not arbitrary or unreasonable.

Lastly, Hooker contends that the Board failed to consider, as a mitigating factor, the fact that she has been an exemplary police officer with no disciplinary history. Hooker asserts that the Board's failure to consider her service record as to mitigate the sanction of discharge, arbitrary. The Court respectfully disagrees. An administrative agency need not give mitigating evidence sufficient weight to overcome a termination decision, and a discharge decision made despite the presentation of such evidence is not, without more, arbitrary or otherwise erroneous. Malinowski v. Cook County Sheriff's Merit Bd., 395 Ill. App. 3d 317, 323 (1st Dist. 2009), citing Siwek, 374 Ill. App. 3d at 738-39.

This Court recognizes that the sanction of discharge is severe. This Court, however, cannot overturn the Board's determination simply because this Court would have imposed a less drastic sanction. The issue is whether the sanction of discharge in this case was unreasonable, arbitrary or unrelated to the needs of service. This Court finds that it was not and accordingly affirms the Board's decision.

CONCLUSION

For all the foregoing reasons, the decision of the Board is affirmed and this matter is dismissed in its entirety with prejudice.

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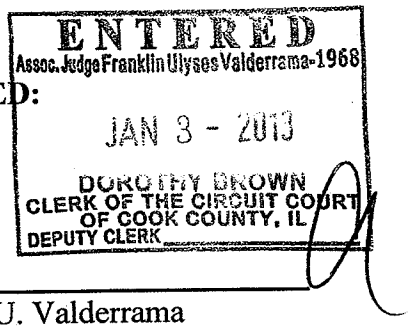

Franklin U. Valderrama
Judge Presiding

Date: January 3, 2013